Abstract

2nd DIVISION

No. 11600 Publish Abstract Only Agenda 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

MAY TERM, A. D. 1962

37 I.A.2 22

L. O. WHYBARK CO., INC., A Corporation,

Plaintiff-Appellant,

vs.

JAMES H. HALEY,

Defendant-Appellee.

Appeal from the Circuit Court of Winnebago County.

WRIGHT -- P. J.

The plaintiff, L. O. Whybark Co., Inc., instituted this action in the Circuit Court of Winnebago County against the defendant, James H. Haley, for an amount alleged to be due the plaintiff by the defendant under a written equipment lease contract whereby the defendant leased from the plaintiff a certain John Deere model 420 C crawler type tractor and loader. The case was tried before a jury which returned a verdict finding the defendant not guilty. Judgment for the defendant was thereupon entered by the court, from which judgment plaintiff appeals.

Plaintiff is an Illinois Corporation located in Rockford, Illinois, and is in the business of leasing and selling earth moving equipment. The defendant is a building contractor also located in the City of Rockford. In February of 1958, defendant contacted the plaintiff concerning the leasing of a John Deere model 420 C tractor.

The equipment was delivered by plaintiff to the defendant in the early part of April, 1958, and the defendant began using the equipment in his construction business and continued to use it until the last of August or the first of September, 1958.

The written lease which is the subject matter of this appeal was executed by the parties on May 27, 1958, some sixty days after defendant had taken possession of and actually commenced using the equipment.

The equipment lease contract commenced on May 27, 1958, and terminated on June 27, 1962. The contract provided for rent to be paid as follows: $308.00 cash upon the execution of the lease and $154.00 on the first day of each forty-eight successive months commencing with the month of July, 1958. Although the lease recited receipt of the $308.00, it was not paid at the time of the execution of the lease. The defendant made monthly payments in July, August, September and December of 1958 and, in addition, the defendant paid to plaintiff the sum of $308.00 on December 12, 1958. It is not clear whether

this represents the original down payment or represents the payment of two monthly installments. Thereafter, the defendant defaulted in his payments and the plaintiff after making demand took possession of the equipment in June, 1960, and in July, 1960, the equipment was sold by plaintiff to a third party for the sum of $3,650.00 and defendant's account credited for that amount.

Plaintiff contends that the trial court erred in denying plaintiff's motion for a directed verdict.

Defendant argues that the plaintiff warranted the machine in question as being suitable for the excavation of basements; that the defendant relying upon such warranty leased the machine; that the machine was not suitable for such work and that there was a breach of warranty which relieved the defendant from any liability under the lease.

The plaintiff urges that it did not make any expressed warranties with reference to the use of the machine, and further that the defendant by the terms of the lease expressly waived any and all rights that he might have by virtue of an implied warranty. Plaintiff further urges if an implied warranty existed the defendant by his conduct waived any rights which accrued to him by virtue thereof.

Defendant testified that in September, 1958, he began to have trouble with the equipment and did not thereafter use it.

He further testified that one of the uses that he made of the machine was the excavation of basements and that he could not use it in this endeavor successfully. He further testified that he attempted to dig two basements with the machine and that it broke down on each occasion.

In June, 1958, the defendant was involved in an automobile accident and apparently seriously injured. Representatives of the plaintiff called upon the defendant at the hospital at the request of the defendant. The defendant stated that his purpose for requesting them to come to the hospital was to negotiate with plaintiff to repossess the equipment. He further testified that after his automobile accident it was obvious that he could no longer work for some length of time and that he wanted the plaintiff to dispose of the equipment and credit his account.

The uncontradicted testimony of the plaintiff is to the effect that at the time the defendant signed the equipment lease on May 27, 1958, being some sixty days after he had took possession of the equipment and commenced to use it, he made no complaint that the equipment was not functioning properly. The lease before us stated in reference to warranties, the following:

> "E. Lessee agrees that each item of Equipment is of a size, design and capacity

> selected by Lessee and that the same is suitable for its purpose. Lessor has made no representation or warranty, statutory or otherwise, and undertakes no obligation with respect to the Equipment or its performance except such obligations as may be undertaken in a written statement designated 'Warranty' executed by Lessor concurrently herewith and attached hereto. Such Warranty applies only to items specifically enumerated therein. Lessor assumes no obligation whatsoever to Lessee for time lost or penalties suffered by Lessee while Equipment is inoperable for any reason and no deductions are to be made from rental payments therefor."

There is no evidence in the record before us that the plaintiff expressly warranted the machine in question for any purpose at the time it was delivered to the defendant or at the time of the execution of the lease contract.

Implied warranties are imposed by law and do not arise from any agreement in fact of the parties, and under Illinois law various statutory implied warranties are contained in every contract of sale unless expressly rejected by the parties to the contract. Warranties will not be implied in conflict with the express terms of the sale agreement, or contrary to the manifest purpose of the parties where the facts clearly negative any intention to warrant. 32 I.L.P., Sales, Sec. 142.

Implied warranties may be expressly excluded by the terms of the contract of sale and such terms are valid. A complete negation of an implied warranty occurs where there exists any

words or conduct tending to show that such was the intention of the parties. 32 I.L.P., Sales, Sec. 143.

In our opinion it is clear that the defendant by virtue of Paragraph E, supra., of the lease expressly waived any and all rights that he might have had by virtue of an implied warranty.

Assuming but not conceding that the defendant did not waive any rights to an implied warranty by Paragraph E, supra., of the lease, it appears equally clear that defendant has done so by his conduct and action. As to those characteristics or defects of property which are obvious and discoverable by ordinary examination, it is the general rule that no implied warranty exists where the parties deal at arm's length and on equal footing and there has been an inspection or test of the property prior to the sale, in the absence of fraud or justifiable reliance on the seller by the buyer. Grass v. Steinberg, 331 Ill. App. 378, 73 N. E. 2d 331.

The defendant first agreed to lease the equipment in question in February, 1958, and it certainly can be assumed that he was familiar with it and inspected it at the time. The defendant then took actual possession of the equipment in the first part of April, 1958, and used the equipment in his contracting business from that time to the date of the execution of the lease on May 27, 1958, and thereafter until September of that year, and made rental payments on the lease

is reversed and the cause remanded with directions to enter judgment in favor of the plaintiff in the sum of $3,126.00, notwithstanding the verdict in favor of the defendant.

JUDGMENT REVERSED AND REMANDED, WITH DIRECTIONS.

CROW, J., and SPIVEY, J., Concur.

48560

(37 I.A.2113)

JESSIE M. DASINS,	)	
	)	
Appellant,	)	APPEAL FROM
	)	
v.	)	CIRCUIT COURT
	)	
JOSEPH M. DASINS,	)	COOK COUNTY.
	)	
Appellee.	)	

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This appeal is taken from an order of the Circuit Court of Cook County denying, after hearing, a petition by Jessie M. Dasins (hereafter referred to as the plaintiff), and from an order of the court refusing to vacate the said order. The petition sought to have Joseph M. Dasins (hereafter referred to as the defendant) contribute to the support of a handicapped daughter of the parties while she attends college.

The plaintiff and the defendant were married December 24, 1937. Their only child was Martinette Dasins, born on October 3, 1942. The marriage was dissolved by a divorce decree entered in the Circuit Court of Cook County on August 13, 1954. The plaintiff was given custody of the minor child and the defendant was granted rights of visitation. Attached to and made a part of the decree was an agreement of the parties with reference to property rights. By that agreement it was provided that the parties should deed to the Chicago Title and Trust Company, as trustee, certain premises. The trust agreement was to provide that the beneficial interest in the real estate should be held one-third by Martinette, one-third by the plaintiff, and one-third by the defendant, with further specified provisions for devolution of the property

in the event of the death of one or more of the parties. The premises were to be used as a residence for Martinette, and the right to all emoluments of the property was to be in the plaintiff and Martinette, and they were to be responsible for maintenance, repairs, taxes, insurance, etc. The plaintiff waived alimony. The divorce decree further provided that the defendant should pay as child support $25 per week based upon his income at that time, which sum was to include ordinary medical expenses.

On March 15, 1961 plaintiff filed a petition wherein she sought to have the court enter an order requiring the defendant to pay for the support and education of Martinette while she is attending the university. The defendant did not file an answer to the petition. The petition alleges that Martinette is eighteen years old and is enrolled in the University of Illinois as a freshman; that she is an excellent student and has won a scholarship which pays her tuition; and that the plaintiff is not employed and is unable to furnish funds to enable Martinette to continue in college.

At a hearing on the petition the plaintiff testified in her own behalf. The defendant appeared by counsel. The plaintiff testified to the facts as stated in the petition, and further stated that Martinette is physically handicapped in that she has only one eye; that the cost of sending her to college would be $2,000 a year; that she has a scholarship amounting to $450 a year; and that she works in the summer earning $35 a week for two and one-half months. The plaintiff

further testified that she is unable to work because of her health and that the defendant earns "$112.00 a week net." The defendant offered no testimony in his own behalf. On March 22, 1961 the trial judge denied the petition.

Leave was given to the plaintiff to file a petition to vacate the court's order of March 22, 1961. On April 13, 1961 the court denied that petition.

This appeal is taken from both orders of the trial court.

No answer was filed to either of the petitions. There was no conflict in the testimony and the facts are not in dispute. Hence their legal effect becomes a matter of law and the rule as to the power of the court to set aside the decision only when it is against the manifest weight of the evidence has no application. Fransen Const. Co. v. Industrial Com., 384 Ill. 616, 52 N.E.2d 241.

The sole question presented to us in this appeal is whether the father of an adult child should be required to support her while she attends college when she is physically handicapped and apparently a good student, and where it is shown that he is presently employed and receives a wage sufficient to contribute to the support of the child. In Strom v. Strom, 13 Ill. App.2d 354, 142 N.E.2d 172, it was held that a father who had sufficient means must provide a college education for his adult physically afflicted daughter. In Maitzen v. Maitzen, 24 Ill. App.2d 32, 163 N.E.2d 840, the court also so held, and in that case stated: "The public policy of this state, that a college education be given

children whenever possible, is evidenced by the many institutions of higher education maintained by the state." The holding in the instant case must be in accordance with those decisions. The trial court on the hearing should determine the amount of the contribution which properly should be made by the defendant. The orders of the Circuit Court of Cook County are reversed and the cause remanded for such other and further proceedings as are in accordance with this opinion.

Reversed and remanded.

Dempsey, P.J., and Schwartz, J., concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
MAY TERM, A.D. 1962

JOYCE ELAINE WELLMAN, Plaintiff-Appellee, vs. LEO FRANKLIN WELLMAN, Defendant-Appellant.	Appeal from the Circuit Court, Winnebago County.

McNEAL, J. --

This is an appeal by defendant, Leo Franklin Wellman, from a decree entered on February 16, 1962, by the Circuit Court of Winnebago County granting plaintiff, Joyce Elaine Wellman, a divorce from the defendant.

Plaintiff and defendant were married at Rockford on June 29, 1957, and three children were born of the marriage. In her complaint filed on December 13, 1961, plaintiff alleged that defendant had been guilty of extreme and repeated cruelty on November 11 and again on December 7, 1961. Defendant filed an answer in which he denied the allegations of cruelty. At the trial before the court without a jury plaintiff testified that defendant struck her on the dates alleged, and he testified that he never struck her at any time. There were no other witnesses. In its decree the court found defendant guilty of cruelty as alleged, dissolved the marriage, awarded plaintiff custody of the children subject to defendant's right to visit them at reasonable times, and ordered him to pay plaintiff $10 per week for the support of each of the three children. Defendant appealed.

On appeal defendant's sole contention is that a divorce will not be granted upon uncorroborated testimony as to the alleged

acts of cruelty. No question is raised on the pleading, or with reference to the degree of cruelty involved, or with regard to the weight of the evidence. Appellee made no appearance here, and filed no brief in this court.

Appellant cites Coolidge v. Coolidge, 4 Ill. App. 2d 205, 216, and Tesor v. Tesor, 13 Ill. App. 2d 478, 481, and these cases support appellant's contention. However, in Surratt v. Surratt, 12 Ill. 2d 21, 23, a husband was granted a divorce on the ground of cruelty and the wife appealed, contending that his testimony was not corroborated by other evidence. In affirming the decree a few months after the decision in the Tesor case, the Supreme Court said: "The position is without merit. There is no rule requiring corroboration in a case such as this * * * . This court would not be justified in reversing a determination which, as here, is dependent upon the weight and credence to be given the testimony of witnesses."

The trial court had the opportunity to observe the conduct and demeanor of the plaintiff and the defendant while testifying. From such observance and their testimony the court had the duty to determine the credibility and the weight of their testimony, and whether or not, upon weighing the evidence, the proof showed by a preponderance that the defendant was guilty of extreme and repeated cruelty as charged. The absence of corroborative testimony may be a proper circumstance to be considered in any case, and in a particular case the absence of corroborative proof might warrant a trial court considering the plaintiff's testimony alone not sufficiently credible to be accepted. Balfour v. Balfour, 20 Ill. App. 2d 590. If the complaint is taken as confessed, the court is required by section 8 of the Divorce Act (Par. 9, Ch. 40, Ill. Rev. Stat. 1961) to hear the cause by examination of witnesses in open court, and in case of default the court may not grant a divorce unless the judge is satisfied

that the cause has been fully proven by reliable witnesses. But in a case such as this there is no arbitrary rule requiring corroboration of plaintiff's testimony relative to the facts claimed to be grounds for divorce if her testimony alone is sufficiently credible in the light of opposing evidence to warrant acceptance by a reasonable person. Surratt v. Surratt, 12 Ill. 2d 21, 23; Sayad v. Sayad, 27 Ill. App. 2d 250, 169 N.E. 2d 585.

We conclude that the Circuit Court of Winnebago County committed no error in granting plaintiff a decree of divorce on her uncorroborated testimony, and therefore the decree is affirmed.

AFFIRMED.

DOVE, P. J., and SMITH, J., concur.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1962

37 I.A. 147

Term No. 62-M-10

Agenda No. 5

LINDELL T. CRUMP,	)	
	)	
Plaintiff-Appellee,	)	Appeal from
	)	Circuit Court
vs.	)	St. Clair,
	)	County.
FRED GILL,	)	
	)	
Defendant-Appellant.	)	

CULBERTSON, J.

This is an appeal from the Circuit Court of St. Clair County which arose following the taking of judgment on two notes against defendant, FRED GILL, by plaintiff, LINDELL T. CRUMP. Defendant thereafter, after the judgment taken by confession, moved for leave to open and defend the action and to file a counter-claim. Such motion was allowed and a trial thereon was had before a jury. As a result of the trial a verdict was returned as against the plaintiff on the two notes in favor of defendant on his counter-claim, and said defendant was awareded damages against plaintiff in the amount of $2,000.00. Plaintiff thereafter moved for judgment notwithstanding the verdict and the Trial Court allowed such motion notwithstanding the verdict in favor of the plaintiff and as against defendant.

The parties to the action had entered into a written partnership agreement

and the notes upon which judgment had been taken were given by defendant to plaintiff during the course of the partnership. After the partnership had terminated the defendant left his cattle with the plaintiff. It was the plaintiff's contention that the notes were given and that the defendant surrendered his interest in the cattle in satisfaction of his share of the partnership expenses which were paid by plaintiff in excess of contributions to the partnership by the defendant. Defendant, on the other hand, contended that the cattle were to be sold, the notes cancelled as paid, and the excess, if any, of defendant's one-half interest in the cattle was to be paid over to the defendant. The cattle were not sold but their value was more than $2,000.00 above the $1100.00 specified in the notes. There was disagreement as to the amount of farm income, expenses, debts, and profits.

On appeal in this Court defendant contends that the only question properly presented on the judgment notwithstanding the verdict is whether there was any evidence in the record tending to sustain the verdict, and that defendant was entitled to the benefit of all the evidence favorable to him, and was entitled to have any questions of disputed evidence resolved in the manner most favorable to the verdict.

The evidence as presented in the Trial Court, clearly established that an accounting was made at the termination of the partnership activities, and that defendant assigned his interest in the partnership to the plaintiff, and that at the time defendant made said agreement he expected no additional funds and believed that he still owed $1100.00 which he confirmed by a letter a year later. The Trial Court apparently took the position that where the parties, in absence of fraud, duress, or mutual mistake, undertook a

settlement or dissolution of the partnership, it was binding on the partners (JANCI vs. CERNY, 287 Ill. 359); and that any agreement between the partners which settled the affairs of the partnership would bar the assertion of any claims inconsistent with such agreement.

The record shows no evidence of fraud or mistake, and in absence of any such showing the decision of the Trial Court will be required to be affirmed.

Judgment affirmed.

Scheineman, P.J., and Hoffman, J., concur.

Abstract.

Abstract

General No. 11602 (Abstract Only)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(Second Division)

MAY TERM, A. D. 1962

37 I A 2 158

JOHN WALKER DAVIS,

Plaintiff-Appellant,

vs.

THE BOARD OF FIRE AND POLICE COMMISSIONERS of the City of Peoria, Illinois,

Defendant-Appellee.

Appeal from the Circuit Court of the County of Peoria, Illinois

SPIVEY -- P. J.

The Circuit Court of Peoria County in a proceeding under the Administrative Review Act affirmed a decision of the Board of Fire and Police Commissioners of the City of Peoria discharging the plaintiff-appellant from his position of police officer.

The preferred charges were, inter alia, conduct unbecoming an officer which might be detrimental to the service, immorality, neglect of duty, and any other act or omission contrary to good order and discipline of the department. Details of the charges, together with the specific rule of the department alleged to have been violated and applicable to such rule, were served upon the plaintiff. Plaintiff was afforded a full hearing at which he testified and at

which he was represented by counsel. The testimony taken was transcribed and was before the trial court on review.

This appeal is predicated upon the single proposition that the evidence fails to support the findings and decision of the Board under the charges preferred. More in particular, plaintiff contends there was no evidence that he knew the alleged premises were used for the purpose of prostitution, the illegal sale of alcoholic liquor, and the persons he consorted with were prostitutes.

The facts brought out on the hearing revealed that at the time of the alleged acts culminating in plaintiff's discharge, he had been a police officer for three years. He had been married, divorced, remarried, and at that time was living in a semi state of estrangement.

Early in December of 1960, he met Pamela Parker and another girl named Tony about midnight in a local tevern. He had known Pamela casually for about a year. The next day he called her and she came to his home. Subsequently, he visited her at 231½ N. Adams Street in Peoria. The visits or meetings at this place occurred two or three times a week until about Christmas of that year, and were generally late at night after he was off of duty. He would on occasion remain the balance of the night at that address.

Pamela and Tony were prostitutes working for a man named Gunderson who operated the premises at 231½ Adams Street. The girls, in addition to receiving customers at that address, solicited in the local taverns.

Gunderson's establishment consisted of the second and third floors of an old hotel. The third floor, consisting of nine rooms, was used as a rooming house. The second floor was occupied by two or three prostitutes. Each girl had a separate room and the other rooms on that floor were used to perform any immoral acts. In addition, there was a kitchen and a small bar room. To gain access to the kitchen one must pass the bar room, the kitchen being

adjacent to the bar room. Liquor was sold without a license by the prostitutes who acted as bartenders. Arrangements for the services of the girls was handled in the bar room. If the girl in demand was in her private room the prospective client rapped on her door and she would leave to fulfill her duties in another room reserved for that purpose.

On the occasion of plaintiff's visits he would talk to everyone present, and on occasions, he was gratuitiously served beer by Gunderson. His conversations and drinking usually took place in the kitchen, otherwise he would be in Pamela's private room. As many as five persons have been in the bar room while plaintiff was present in the establishment.

Davis, Pamela, Tony and plaintiff's minor nephew drove to Chicago on December 23, 1960. Plaintiff delivered Christmas presents to the children of his first marriage. The remainder of the time he divided between his present estranged wife and Pamela, Tony and Gunderson who was also in Chicago at that time.

On January 11, 1961, Gunderson's premises was raided, and he, Gunderson and three prostitutes were arrested. Following his arrest and while in custody, Gunderson made a statement that implicated the plaintiff. On the same day, when confronted with these facts, plaintiff resigned from the police force, which resignation was later repudiated.

Davis either admitted or failed to deny many of the essential facts except as to the number of visits to 231½ Adams St. He admitted having sexual relations with Pamela, however he excused himself of any immorality on the grounds that he had paid nothing for those favors. He denied that he knew Pamela was a prostitute, believing she was then seeking employment, and that he knew the premises were being used for the purpose of prostitution and the illegal sale of alcoholic liquor. He stated that his

observations of what was transpiring were limited, in that, "I was trying to be discreet about it", "I was trying to reconcile with my wife", and "I didn't want anybody to know I was going with this girl."

This appeal being narrowed to a question of fact, the only questions for this court's decision is whether the order of the board is against the manifest weight of the evidence and does the record contain evidence fairly tending to support the charges.

The niceties of findings or lack thereof is of relative unimportance under the Administrative Review Act. It is the record to which the Circuit Court and this Court look. If the record discloses that the board acted upon evidence that fairly tends to sustain the charges the Circuit Court and this Court cannot substitute its judgment for that of the board. Nolting v. Civil Service Commission, 7 Ill. App. 2d. 147, 129 N.E. 2d. 236, and Massey v. Fire and Police Commissioners, 26 Ill. App. 2d. 147, 167 N.E. 2d. 810.

In proceedings subject to the Administrative Review Act it is the function of the original agency to determine the credibility of the witnesses, Taylor v. Civil Service Commission, 33 Ill. App. 2d. 48, 178 N.E. 2d. 200; draw all legitimate inferences and conclusions from the evidence, Massey v. Fire and Police Commission, 26 Ill. App. 2d. 147, 167 N.E. 2d. 810; and resolve all conflicts in the evidence, Adamek v. Civil Service Commission, 17 Ill. App. 2d. 11, 149 N.E. 2d. 466.

Cause for discharge has been said to be some substantial shortcoming which renders continuance in office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and sound public opinion recognizes as a good cause for no longer occupying the position. What constitutes cause is for the hearing board to decide so long as such decision is related to the requirements of the service and not so

trivial as to be unreasonable and arbitrary. Nolting v. Civil Service Commission, 7 Ill. App. 2d. 147, 129 N.E. 2d. 236.

Plaintiff does not contend that if the record fairly supports the charges that his discharge would be for cause. His only argument is that the record is absent of any proof fairly tending to prove he was aware of his surroundings and associates. We consider this argument fatuous.

To think that a man like Gunderson would permit a police officer to frequent his illegal establishment without being aware of the nature of the business being conducted, and that a three-year police officer twice married who was trying to be discreet would be unaware of his surroundings all as evidenced by the record is beyond our comprehension. Any other inference would be unworthy of serious consideration.

We conclude that the record supports the board's decision discharging the plaintiff for cause under the charges preferred.

We find no reason to consider plaintiff's suggestion that he was not charged with ignorance or stupidity.

The order of the Circuit Court of Peoria County affirming the decision of the Board of Fire and Police Commissioners of the City of Peoria is affirmed.

Affirmed.

Crow, J. and Wright, J. Concur

NO. 11660 Agenda 19

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
MAY TERM, A.D. 1962

(37 I.A.2 166)

BOARD OF EDUCATION OF CONSOLIDATED SCHOOL DISTRICT NO. 138 OF WINNEBAGO COUNTY, ILLINOIS, and SCHOOL DIRECTORS OF DISTRICT NO. 14 OF WINNEBAGO COUNTY, ILLINOIS,	
Plaintiffs-Appellants,	Appeal from Circuit Court,
vs.	Winnebago County.
COUNTY BOARD OF SCHOOL TRUSTEES OF WINNEBAGO COUNTY, ILLINOIS, ET AL,	
Defendants-Appellees.	

McNEAL, J. -

This is an appeal from a decree dismissing a complaint for an injunction. Plaintiff school districts 14 and 138 allege that on May 13, 1961, a petition to detach certain territory from their districts was filed with the county board of school trustees; that the board granted the petition on July 10, 1961; that the matter was heard by the circuit court on administrative review; and that on October 5, 1961, the circuit court held that the petition was not signed by the required number of legal voters and the county board was without jurisdiction to detach the territory. Plaintiffs further allege that a second petition to detach substantially the same territory was filed with the county board and that the board set the petition for hearing on April 16, 1962. Plaintiffs claim that this second petition is barred by section 7-8 of the School Code of 1961, which provides that once it is determined that certain territory should not be detached, a second attempt to detach such territory should not be made for at least one year. Plaintiffs prayed that section 7-8 be construed to preclude the filing of another petition until a year after October 5, 1961, and that the school trustees be enjoined from acting upon the second petition.

Motions were filed to dismiss the complaint for failure to state a cause of action. The motions were allowed, the complaint was dismissed with prejudice, and this appeal followed.

It is undisputed that the first petition was denied because it lacked the requisite signatures, that a second petition to detach the same territory was filed within the one-year period, and that the primary question is whether this second petition is barred by section 7-8 of the School Code. Section 7-8 reads as follows:

> "No territory, nor any part thereof, which is involved in any proceeding to change the boundaries of a school district by detachment from or annexation to such school district of such territory, and which is not so detached nor annexed, shall be again involved in proceedings to change the boundaries of such school district for at least one year after final determination of such first proceeding."

Counsel for appellants cite People v. Hubble, 378 Ill. 377, and counsel for appellees rely upon People v. Regnier, 377 Ill. 562, and People v. Hurst, 401 Ill. 158.

In People v. Hubble, 378 Ill. 377, a petition to organize a community high school district was filed, an election was held under the petition, and the proposition was defeated. Within two years, a second attempt was made to form a community high school district embracing some of the same territory involved in the first proceeding. The Supreme Court held that the second proceeding violated a statute which provided that no territory involved in a proceeding to organize a community high school district and not so organized should be again involved in any such proceeding oftener than once every two years.

In People v. Regnier, 377 Ill. 562, the validity of a community high school district was challenged on the ground that a petition on file to create another district included some of the land in the first district. The Supreme Court upheld the validity of the first district, pointing out that a number of signers of the second petition had withdrawn their names, "thereby nullifying the petition by reducing the number of signers to less than the fifty required by the statute."

Likewise in People v. Hurst, 401 Ill. 158, 161, the validity of a community high school district was challenged because the same territory had been involved in three petitions filed within the preceding two years. The Court said:

> "In the case of each of these petitions, the names of certain of the petitioners were withdrawn therefrom, thereby leaving less than the required number of signers, and before any final action was taken thereon or election held pursuant thereto. We are of the opinion the withdrawing petitioners had a right to so withdraw their names * * *, and that by doing so all three petitions were nullified and of no effect and therefore do not come within the two-year statutory disqualification.
>
> "In * * * Hubble * * * it was stipulated that an election had been held and that the proposition for the organization of such community high school district was decisively voted down; also, in that case there were no names withdrawn from the petition."

The decisions cited above were rendered in quo warranto actions to test the validity of community high school districts. The statute considered in those cases has been re-enacted as section 12-3 of the School Code of 1961. It provided that no territory involved in "any petition, election or proceedings" to organize a community high school district and not organized as or included within a community high school district shall be again involved in "any petition, election or proceedings" to organize a community high school district oftener than once every two years. While the provisions of that statute are similar to those contained in section 7-8, it should be noted that "election" is not an element in section 7-8, and that this section contemplates involvement of territory only in "any proceedings" to change boundaries of a district wherein the boundaries were not changed, and a prohibition against further involvement in any such proceedings within a year after final determination of the first proceeding.

In our opinion the filing of the petition in 1961 to detach territory from the plaintiff districts, the hearing and granting of such petition on its merits by the board of school trustees, and the administrative review thereof by the circuit court clearly constituted a "proceeding" to change the boundaries of the districts, within the meaning of section 7-8; and the court's decision on October 5, 1961, that the petition was

insufficient, was a final determination of that proceeding. The Court's reference in the Hurst decision to the withdrawal of names from the petitions "before any final action was taken thereon or election held pursuant thereto", implies a termination of such proceeding either by final judicial action or by election. In the instant case no names were withdrawn from the petition and no election was held, but the circuit court's determination of the first proceeding on October 5, 1961, was equally as effective as an election to terminate the proceedings to change the district's boundaries. The provisions of section 7-8 forbid further involvement in proceedings to change boundaries for at least a year after such final determination.

Appellees also urge that appellants failed to exhaust their administrative remedies. In their complaint plaintiffs allege that defendants requested the legal advisor for the Superintendent of Public Instruction to furnish a legal interpretation of section 7-8, that the legal advisor wrote defendants that the limitation contained in section 7-8 was not applicable, and that by virtue of such advice the county board then took the position that the section had no application and proceeded to set the second petition for hearing within the year. These facts together with all reasonable inferences which may be drawn therefrom are to be considered as admitted when the sufficiency of plaintiffs' allegations are tested by defendants' motions to dismiss. Under such circumstances it appears that any pursuit of an administrative remedy before the defendant board would have been futile and that plaintiffs had no adequate remedy at law.

For these reasons we conclude that the trial court erred in sustaining defendants' motions to dismiss and in dismissing plaintiffs' complaint. Accordingly the decree of the Circuit Court of Winnebago County is reversed and the cause remanded to that court with directions to deny the motions.

Reversed and remanded with directions.

SMITH, J. Concurs

DOVE, P.J., Dissents

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the ~~Fourth~~ THIRD Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE C. ROSS REYNOLDS, Presiding Judge

HONORABLE WILLIAM M. CARROLL, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 22nd day of OCTOBER A. D. 19 62, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

11125

FILED

OCT 22 1962

Robert E. Conn, CLERK
APPELLATE COURT 3rd DIST.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10410 Agenda 10

Ruth E. Miller and Carl J. Miller, Plaintiffs-Appellants, vs. Roy C. Dexheimer, Jr., doing business as Moonlight Garden Skating Rink, and other unknown owners, Defendants-Appellees.	)	Appeal from the Circuit Court of Sangamon County

ROETH, J.

Plaintiff Ruth E. Miller brought suit against the owners of a roller skating rink, for injuries sustained by her resulting from a fall while attending a skating party sponsored by a local church group. Her husband joined her as co-plaintiff alleging as damages certain medical expenses incurred, loss of services and consortion. The jury returned a verdict in favor of both plaintiffs for $250.00 each. The lower court subsequently granted defendants' post trial motion for judgment notwithstanding the verdict. The husband of Ruth Miller was not present at the time the incident occurred and future reference to plaintiff refers to Ruth Miller only.

Plaintiff charged the defendant with numerous acts of

negligence in the operation of the rink. It is clear, however, that the only testimony offered was designed to prove that defendant negligently rented plaintiff a pair of defective roller skates. Counsel for plaintiff in their brief rely only upon this charge of negligence.

The facts of the case are quite simple. In substance, plaintiff went to a roller skating rink to attend a church party. A friend paid the price of her admission and the rental price for a pair of shoe skates. She put the skates on and skated around the rink, a hard maple floor 95 feet wide by 220 feet long, twice and on the third time around was advised that the next "skate" was a "couple skate". She selected a high school girl as a partner and the two skated around the floor one time and while skating the rink a second time plaintiff fell, fracturing a bone in her forearm. The testimony was that the fall was not due to plaintiff's partner, any other skater or because of the condition of the floor. All proof is aimed at alleged defects in the skates rented. Plaintiff testified the skates that were given to her were the ordinary shoe skates which she had rented in other rinks before, and there was nothing unusual about them other than they were "kind of old, they're usually dirty, they're not polished up like sometimes you would do your own". That they were "the usual wooden wheel and white and dirty and kind of

cracked from use". From the evidence it is apparent that the reference to the shoe of the skate being cracked has reference to the leather of the shoe and not the wheels. However, it is not claimed that the leather cracking had anything to do with plaintiff's fall. She had skated approximately on 50 different occasions prior to the time of the fall and therefore was not inexperienced. While she was skating around the rink on approximately the fourth lap she "noticed they (the skates) felt a little bit tight* * * and *** my wheels didn't seem to move with my feet, they seemed awful loose. * * * They (the skates) didn't seem to want to move with my feet. They seemed awful loose, especially the right skate. The wheels were loose on my skate and they didn't seem to want to move with my feet *** ". She noticed this when she went around corners but when she skated straight ahead this caused her no concern or bother. Although this condition was apparent to her when she started skating she made no complaint to the defendants or any of their employees present on the evening in question, nor did she ask to have the skates replaced or examined or adjusted. As plaintiff skated around the rink with her partner and was making a turn she put her right foot over in front of the left to make the turn and as the wheels of the skate touched the floor she was thrown off balance whereupon she pulled her right foot backwards so that the

back of the right skate came in contact with the front of the left skate, causing her to fall.

It is undisputed that the skates available at defendants' rink were the ordinary type. The wheels are mounted on a truck with a black rubber insert so that as the skater leans from one side to the other the rubber will give and make the skates turn whichever way the body of the skater is leaned. There is an adjustment screw on each skate which is used to make the truck looser or tighter, depending on the wishes of the skater.

Defendants' evidence consisted of his testimony regarding the care of the skates at the rink, a statement allegedly made by some unidentified person in plaintiff's presence to the effect that plaintiff fell because "she locked her wheels" and the introduction of a pair of skates into evidence, they allegedly being the skates worn by plaintiff on the night of the fall. Defendant testified that after he received the skates in question he put them away with a note to the effect that they were the ones involved in the accident, and he further testified that the particular skates were in the same condition as they were at the time of the fall and that they were in good operating condition. Plaintiff and a witness for plaintiff denied that these were the same skates. The evidence is not in conflict except where shown above. Defendant testified that after a pair of skates had been

returned after use by a skater they were placed in a bin with the wheels "backwards into the bin". They were not then "passed out to customers" until they were checked and repairs, if any, made. When the check is completed the skate is ready for re-letting and they are turned in the bin "with the toe in first". The defendant testified that the skates which plaintiff used had been checked prior to the incident and that it would have been impossible that any skates were used that evening which had not had a prior checking for defects.

While it is true, as the plaintiff asserts, a conflict in testimony should be properly left to a jury, plaintiff is also well aware that whether she proved her case in the first instance is a question of law for the court. In considering a motion for judgment notwithstanding the verdict the court has no authority to weigh and determine controverted questions of fact, preponderance of the evidence or credibility of witnesses, but shall only consider such evidence most favorable to the plaintiff taken with all legitimate inferences most favorable to plaintiff. Lindroth v. Walgreen Co., 407 Ill. 121, 94 N.E. 2d 847; Storment v. Swift & Company, 5 Ill. App. 2d 417, 125 N.E. 2d 697. Where, after so considering the evidence, there is a complete absence of the essential elements necessary to establish negligence on the part of the defendant the court has a duty to direct a verdict in

favor of the defendant or to render judgment notwithstanding the verdict. Carrell v. New York Cent. R. Co., 384 Ill. 599, 52 N.E. 2d 201. In considering, then, only the testimony favorable to plaintiff and as called to the court's attention by plaintiff, we find the record devoid of proof of a defect in the skates. The fact that the shoe of the skate felt tight or the wheels seemed loose did not, in the light of the undisputed evidence as to the mechanism of the skates, constitute proof of a defect. The record is devoid of evidence that the tightness of the shoe or the so-called looseness of the wheels was in fact a defect. It is urged, however, that the jury could infer a defect from the testimony heretofore detailed and that the case was a proper one for submission to a jury. However, the law does not permit such inference where the existence of another fact inconsistent with the first can be inferred from the same evidence with equal certainty. Kelly v. Fox, 318 Ill. App. 481, 48 N.E. 2d 592. From plaintiff's own testimony the inference that her fall was occasioned by the manner in which she undertook to cross her right foot over her left in making the turn is just as plausible and reasonable as the inference that her fall was occasioned by a defective skate.

The court is aware of the fact that skating involves certain

risks and proprietors of skating rinks must and should exercise care to see that the skates are not defective. It is not, however, proper for the courts to infer that every fall is the result of some defect in the skate where the reason for the fall is not fully explained but left to inference. Negligence is always a question of fact that must be alleged and proved as averred. It can not be supported by mere conjecture or surmise, but must be made referable to some specific cause or defect. Kelly v. Fox, supra.

Generally speaking, trial judges are not prone to direct verdicts. This is as it should be. Ordinarily a trial judge prefers to permit the jury to pass upon the case knowing that he has full control of the verdict on a post trial motion. A careful review of the record indicates that this is what occurred in this case. We are of the opinion that the trial judge properly entered judgment notwithstanding the verdict.

Accordingly the judgment of the Circuit Court of Sangamon County will be affirmed.

Affirmed.

Reynolds, P. Justice, and Carroll, Justice, concur.

48684

PETER S. SARELAS,)
)
Plaintiff-Appellant,) APPEAL FROM
) SUPERIOR COURT OF
vs.) COOK COUNTY
)
GEORGE W. ALEXANDER, et al)
)
Defendants-Appellees.)

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, Peter S. Sarelas, from an order of the Superior Court, in Case No. 61S 5412, entered on July 12, 1961, striking his complaint and denying him leave to file an amended complaint. The appeal was first taken to the Supreme Court which transferred the case to this Court.

Plaintiff states in his brief that he "seeks to hold the defendants liable to damages, charging in his Complaint that during the pendency of his lawsuit in Case No. 58C 17505, they conspired, confederated and agreed with each other to make, compose, write, circulate and publish a falsely fabricated document containing false, defamatory, and libelous statements against the plaintiff, known by them to be false, fraudulent, and corrupt fabrications, when made, written, circulated and published; and that subsequently, they presented, circulated, published, filed, registered and perpetuated such falsely fabricated document in the Office of the Clerk of the Circuit Court of Cook County; that they republished, circulated, re-

filed and presented such document in the court below and again republished, circulated and presented it to the Court, with intent to intimidate, injure, libel, oppress and torment the plaintiff, and to obstruct, pervert, impede and offend the administration of public justice."

Briefly, the charges in the complaint arise from exhibits filed by defendants in Circuit Court Case No. 58C 17505 of a copy of the minutes of a heated and hectic annual meeting of the Hellenic Professional Society, held on October 31, 1958. During the entire year of 1958, the plaintiff was the president of that organization and presided over this meeting that was attended by all of the defendants in the case at bar with the exception of defendants, Timothy M. Bishop and Florence Dasaky.

The principal question before us is whether the documents filed in another court proceeding gave rise to a cause of action for libel and for damages from an alleged conspiracy of the defendants to defame the plaintiff.

The dismissal order of the trial judge entered on July 12, 1961, recited:

> "This matter coming on to be heard upon the motion of the defendants to strike and dismiss the plaintiff's complaint and to enter a judgment against the plaintiff on the pleadings, and upon motion of the plaintiff to strike or deny the said motion of the defendants, and upon the reply of the defendants to the motion of the plaintiff, and after reading the pleadings in the instant case and the record in the case of Peter S. Sarelas,

Plaintiff, vs. John C. Gekas; and Constantine D. Chapralis, alias Major C. D. Chapralis; and Andrew Cardaras; and George W. Alexander; and Themis Anagnost; and Athanasios A. Pantelis, also known as A. A. Pantelis; and William J. Russis; and Demosthenes I. Georgoulis; and A. Thomas Rangaves; and Demetrios Parry; and Spiros D. Soter, also known as S. D. Soter; and Euripides Nittis, also known as E. Nittis; and Constantine Mazarakis; and George S. Porikos; and Evangelos C. Despotes; and Themis Tsaoussis; and Adamantios Androutsopoulos; and George A. Xydis; and George Louris, Defendants, pending in the Circuit Court of Cook County, No. 58C 17505, and after argument of counsel and the court being fully advised in the premises, FINDS:

(a) That the instant case is against the same defendants above mentioned, pending in the Circuit Court of Cook County, No. 58C 17505, except against Timothy M. Bishop and Florence Dasaky; said Timothy M. Bishop who had given affidavit which was used in the prior suit by the defendants in connection with a certain motion therein made by them and the said Florence Dasaky signed the minutes shown by Exhibit J in the instant suit and said minutes were approved by Geo. Alexander.

(b) That the subject matter in the instant suit had arisen during the pendency of the said prior lawsuit and that it was therein relevant and material and was considered by the court.

(c) That the statements complained of by the plaintiff in the instant suit and the affidavit given by the said deponent and the Exhibit J attached to the plaintiff's complaint herein upon which he bases his cause of action is the same and is identical to Exhibit C filed with leave of court in said prior suit and that, therefore, those statements, affidavits and exhibit are privileged.

IT IS ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff be and the same is hereby stricken and that his suit be and it is hereby dismissed and that the plaintiff go hence without day and take nothing by this suit, and that the judgment be entered in behalf of the defendants and against the

plaintiff for their costs.

> IT IS FURTHER ORDERED AND ADJUDGED that the motion of the plaintiff for leave to amend his complaint be and the same is hereby denied, to all of which order and judgment the plaintiff excepts."

We agree with plaintiff that utmost caution should be exercised by the trial courts and by the reviewing courts to uphold the sanctity of the trial by jury. The People v. Hanisch, 361 Ill. 465. However, paragraph 48 of the Civil Practice Act (Ill. Rev. Stats., (1956), C. 110, par. 48) provides that:

> (1) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleadings attached the motion shall be supported by affidavit.
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> ***
>
> (i) That the claim or demand asserted is barred by other affirmative matter avoiding the legal effect of or defeating the claim or demand.
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> ***

Plaintiff contends that the charges in the complaint are fact questions to be determined only by a jury. Whether statements contained in documents or pleadings filed in the course of judicial proceedings are privileged, and not subject to a libelous and defamatory action, would depend upon whether the matter was pertinent or relevant to the cause. This is never left to the jury, but is a question of law for the court. See Sarelas v. Makin, 32 Ill. App. 2d 339. In Harrell v. Summers, 32 Ill.

App. 2d 358, an action was instituted, based on an alleged libel contained in a petition for commitment. A motion for summary judgment was granted, and on appeal, the Fourth District affirmed, stating:

> It has long been the recognized rule of law that whatever is said or written in a legal proceeding which is pertinent and material to the matters in controversy, is privileged, and no action of slander or libel can be maintained thereon. The defamatory words must, necessarily, however be connected with or relative to the cause in hand or the subject of inquiry to be privileged, but all doubts are resolved in favor of relevancy or pertinency. Under the record before us it is apparent the Trial Court properly found that these statements were privileged and properly entered summary judgment in favor of defendants. 32 Ill. App. 2d at p. 361-362.

Having reviewed the record, we feel the trial court properly held that the alleged defamatory matter was relevant and material to the prior case between these parties, and therefore, was privileged.

AFFIRMED

MURPHY, J. and
ENGLISH, J. concur.

Abstract only.